

1 DAVIS WRIGHT TREMAINE LLP
2 THOMAS R. BURKE (State Bar No. 141930)
3 thomasburke@dwt.com
4 505 Montgomery Street, Suite 800
5 San Francisco, CA 94111-6533
6 Telephone: (415) 276-6500
7 Fax: (415) 276-6599

8 DAVIS WRIGHT TREMAINE LLP
9 DAN LAIDMAN (State Bar No. 274482)
10 danlaidman@dwt.com
11 DIANA PALACIOS (State Bar No. 290923)
12 dianapalacios@dwt.com
13 865 South Figueroa Street, 24th Floor
14 Los Angeles, California 90017-2566
15 Telephone: (213) 633-6800
16 Fax: (213) 633-6899

17 Attorneys for Defendant
18 Joseph Teixeira

19
20 UNITED STATES DISTRICT COURT
21
22 CENTRAL DISTRICT OF CALIFORNIA

23
24 CITY OF INGLEWOOD, a public entity,
25 Plaintiff,
26
27 vs.
28 JOSEPH TEIXEIRA and Does 1-10,
29 Defendants.

30 Case No. **2:15-cv-01815-MWF-MRW**

31 Assigned to the Hon. Michael Fitzgerald

32
33 **DEFENDANT'S NOTICE OF**
34 **MOTION AND MOTION TO**
35 **STRIKE PLAINTIFF'S REQUEST**
36 **FOR ATTORNEYS' FEES;**
37 **SUPPORTING MEMORANDUM OF**
38 **POINTS AND AUTHORITIES**

39
40 [Fed. R. Civ. P. 12(f)]

41
42 Hearing Date: June 22, 2015
43 Time: 10:00 a.m.
44 Courtroom: 1600

45
46 [Notice of Motion and Motion to Dismiss
47 (Rule 12(b)(6)); Request For Judicial
48 Notice; Declaration Of Joseph Teixeira
49 With Exhibit B; Declaration Of Dan
50 Laidman; Notice of Lodging of DVDs
51 With Exhibits A, C-F; Notice Of Manual
52 Filing; and [Proposed] Order Filed
53 Concurrently]

54
55 Action Filed: March 12, 2015

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 22, 2015, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard before the Honorable Michael W. Fitzgerald of
4 the United States District Court for the Central District of California, in Courtroom
5 1600 of the Spring Street Courthouse, located at 312 N. Spring Street, Los Angeles,
6 California 90012, defendant Joseph Teixeira will and hereby does move this Court,
7 pursuant to Federal Rule of Civil Procedure 12(f), for an order striking the following
8 portions of the City of Inglewood's (the "City") Complaint:

9 (1) Copyright infringement claim - Page 6, Paragraph 21: "Plaintiff further
10 is entitled to their attorneys' fees and costs pursuant to 17 U.S.C. § 505."

11 (2) Prayer – Page 7, Paragraph C: "An award of costs and attorney's fees
12 under 17 U.S.C. § 505 or any other applicable basis."

13 These references to attorneys' fees should be stricken because the City is not
14 entitled to seek fees in this case. The City fails to allege that the underlying works at
15 issue were registered prior to commencement of the purported infringement or within
16 three months after first publication of the works, nor could it make such allegations,
17 as required under the Copyright Act. See 17 U.S.C. § 412; Memorandum Section III.
18 Consequently, all references to attorneys' fees are immaterial and impertinent under
19 Rule 12(f), and should be stricken.

20 This Motion is based on this Notice of Motion; the attached Memorandum Of
21 Points And Authorities; the concurrently-filed Motion to Dismiss; Declaration of
22 Joseph Teixeira with Exhibit B; Declaration of Dan Laidman; Request For Judicial
23 Notice; Notice Of Lodging of DVDs with Exhibits A, C-F; Notice of Manual Filing,
24 and all other matters of which this Court may take judicial notice, the pleadings,
25 files, and records in this action, and on such other argument as may be heard by this
26 Court.

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1 This Motion is made following the conference of counsel that occurred on
2 April 9, 2015, pursuant to Local Rule 7-3. See Laidman Decl. ¶ 4.

3 DATED: April 16, 2015

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
DAN LAIDMAN
DIANA PALACIOS

6 By: /s/ Dan Laidman

7 Dan Laidman

8 Attorneys for Defendant Joseph Teixeira

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TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. FACTUAL BACKGROUND.....	2
III. THE CITY'S REQUEST FOR ATTORNEYS' FEES SHOULD BE STRICKEN BECAUSE FEES ARE NOT RECOVERABLE AS A MATTER OF LAW.....	4
A. Section 412 Forecloses The City's Request For Attorney's Fees.....	5
IV. CONCLUSION.....	8

1 TABLE OF AUTHORITIES
23 Page

4 Cases

5 <u>Cal. Dep't of Toxic Substances Control v. Alco Pacific, Inc.,</u>	4
6 217 F. Supp. 2d 1028 (C.D. Cal. 2002)	
7 <u>Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.,</u>	4
8 2014 U.S. Dist. LEXIS 130583 (E.D. Cal. Sept. 16, 2014).....	
9 <u>California ex rel. State Lands Comm'n v. United States,</u>	4
10 512 F. Supp. 36 (N.D. Cal. 1981)	
11 <u>Cognotec Servs. Ltd. v. Morgan Guaranty Trust,</u>	5
12 862 F. Supp. 45 (S.D.N.Y. 1994)	
13 <u>Derek Andrew, Inc., v. Poof Apparel Corp.,</u>	5, 6
14 528 F.3d 696 (9th Cir. 2008)	
15 <u>Dos Santos v. Telemundo Commc'ns Grp., LLC,</u>	5
16 2012 WL 9503003 (C.D. Cal. Dec. 19, 2012).....	
17 <u>Equine Legal Solutions v. Buntrock,</u>	5
18 2008 WL 111237 (N.D. Cal. 2008)	
19 <u>Fantasy, Inc. v. Fogerty,</u>	4
20 984 F.2d 1524 (9th Cir. 1993) <u>rev'd on other grounds</u> , 510 U.S. 517	
21 (1994)	
22 <u>Knievel v. ESPN,</u>	2
23 393 F.3d 1068 (9th Cir. 2005)	
24 <u>Konkol v. Oakwood Worldwide Local, LLC,</u>	4
25 2015 U.S. Dist. LEXIS 67 (C.D. Cal. Jan. 2, 2015)	
26 <u>Livingston v. Morgan,</u>	6
27 2007 WL 2140900 (N.D. Cal. July 25, 2007).....	
28 <u>Mackie v. Rieser,</u>	6
29 296 F.3d 909 (9th Cir. 2002)	
30 <u>Moya v. CitiMortgage, Inc.,</u>	5
31 2014 U.S. Dist. LEXIS 50548 (S.D. Cal. Mar. 28, 2014)	

1	<u>N. Cal. River Watch v. Fluor Corp.,</u>	
2	2014 U.S. Dist. LEXIS 141198 (N.D. Cal. Oct. 2, 2014)	4
3	<u>Oddo v. Ries,</u>	
4	743 F.2d 630 (9th Cir. 1984)	6, 7
5	<u>Pamlioff v. Giant Records, Inc.,</u>	
6	1991 WL 334916 (N.D. Cal. Oct. 28, 1991)	5
7	<u>Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.,</u>	
8	832 F. Supp. 1378 (C.D. Cal. 1993)	7
9	<u>Tellabs, Inc. v. Makor Issues & Rights, Ltd.,</u>	
10	551 U.S. 308 (2007).....	2
11	<u>Zella v. E.W. Scripps,</u>	
12	529 F. Supp. 2d 1124 (C.D. Cal. 2007)	2
13	Statutes	
14	17 U.S.C. § 412.....	<u>passim</u>
15	17 U.S.C. § 505.....	<u>passim</u>
16	Rules	
17	Federal Rule of Civil Procedure	
18	12(b)(6)	1
19	12(f).....	1, 2, 4, 5
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21		
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1 | **MEMORANDUM OF POINTS AND AUTHORITIES**2 | **I.**3 | **SUMMARY OF ARGUMENT**

4 | The City of Inglewood's copyright infringement lawsuit against defendant
 5 | Joseph Teixeira is a thinly disguised effort to silence his constitutionally protected
 6 | speech on issues of public concern. The City alleges that Mr. Teixeira has infringed
 7 | its purported copyrights in its video recordings of several Inglewood City Council
 8 | meetings by including portions of the recordings in documentary-style videos that he
 9 | makes commenting on Inglewood politics and public affairs.¹

10 | The abusive nature of this lawsuit is exemplified by the City's legally invalid
 11 | demand that Mr. Teixeira pay its attorneys' fees and costs pursuant to Section 505 of
 12 | the Copyright Act. See Cmplt. ¶ 21, Prayer ¶ C. The Copyright Act provides that
 13 | "no award of ... attorney's fees ... shall be made for ... any infringement of
 14 | copyright commenced after first publication of the work and before the effective date
 15 | of its registration, unless such registration is made within three months after the first
 16 | publication of the work." 17 U.S.C. § 412. Not only has the City failed to allege that
 17 | it timely registered the underlying works as required to seek attorneys' fees and costs
 18 | under Section 412 and Section 505, it could not possibly satisfy this statutory
 19 | requirement given its other allegations, and materials incorporated by reference into
 20 | the Complaint.

21 | Because the City is barred by Section 412 of the Copyright Act from
 22 | recovering its attorneys' fees in this action, its request for attorneys' fees and costs
 23 | and all related portions of the Complaint should be stricken with prejudice pursuant
 24 | to Federal Rule of Civil Procedure 12(f).

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 1 | As set forth in Mr. Teixeira's concurrently filed Motion to Dismiss
 pursuant to Federal Rule of Civil Procedure 12(b)(6), the City's Complaint fails to
 state a claim and should be dismissed with prejudice for the independent reasons
 that the City has no copyright interest in its public meeting videos under California
 law, and even assuming that it could copyright these public records, Mr. Teixeira's
 political commentary videos are protected by the fair use doctrine.

III.

FACTUAL BACKGROUND

The City alleges that Mr. Teixeira has infringed its purported copyrights by posting to YouTube six videos, as identified in Paragraph 19 of the Complaint²:

- **Video One:** <https://www.youtube.com/watch?v=UyCqRiZXRH8>

Video One was posted to YouTube on February 15, 2014. See Teixeira Decl. ¶ 3(a); Exs. A-1 (video); B-1 (screenshot). It allegedly uses footage from a recording of a July 20, 2010 City Council meeting. Cmplt. ¶ 19.

- **Video Two:** <https://www.youtube.com/watch?v=ZruE0a1UF8g>

Video Two was posted to YouTube on May 24, 2014. See Teixeira Decl. ¶ 3(b); Exs. A-2 (video); B-2 (screenshot). It also allegedly uses footage from a recording of a July 20, 2010 City Council meeting. Cmplt. ¶ 19.

- **Video Three:** <https://www.youtube.com/watch?v=gUUZdTNe7CA>

Video Three was posted to YouTube on December 21, 2013. See Teixeira Decl. ¶ 3(c); Exs. A-3 (video); B-3 (screenshot). It allegedly uses footage from a recording of a May 22, 2012 City Council meeting. Cmplt. ¶ 19.

- **Video Four:** <https://www.youtube.com/watch?v=-5VQZrW7BVY>

Video Four was posted to YouTube on March 3, 2014. See Teixeira Decl. ¶ 3(d); Exs. A-4 (video); B-4 (screenshot). It allegedly uses footage from a recording of an April 11, 2013 City Council meeting. Cmplt. ¶ 19.

- **Video Five:** <https://www.youtube.com/watch?v=MZKTIutCjdI>

² The Court can consider the content of these YouTube pages and videos under the incorporation by reference doctrine because they are mentioned in the Complaint and form the basis for the City's claim. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (court can consider material incorporated by reference into complaint on Rule 12 motion); Knievel v. ESPN, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (considering content of web pages incorporated into complaint and attached to Rule 12 motion); Zella v. E.W. Scripps, 529 F. Supp. 2d 1124, 1139 (C.D. Cal. 2007) (considering content of videos attached to motion to dismiss copyright claim); see also Motion to Dismiss at § III; Request for Judicial Notice.

1 Video Five was posted to YouTube on September 28, 2014. See Teixeira
 2 Decl. ¶ 3(e); Exs. A-5 (video); B-5 (screenshot). It allegedly uses footage from a
 3 recording of an April 23, 2013 City Council meeting. Cmplt. ¶ 19.

4 • **Video Six:** <https://www.youtube.com/watch?v=a1p3l0OmhGM>

5 Video Six was posted to YouTube on September 12, 2014. See Teixeira Decl.
 6 ¶ 3(f); Exs. A-6 (video); B-6 (screenshot). It allegedly uses footage from a recording
 7 of a May 11, 2014 City Council meeting. Cmplt. ¶ 19.

8 The City alleges that it has submitted applications for copyright registrations in
 9 its video recordings of only two of these City Council meetings, May 22, 2012 and
 10 April 23, 2013, and that these applications remain pending. Id. ¶¶ 14, 19, Cmplt. Ex.
 11 A. The City does not allege the date on which it submitted these applications, nor
 12 has it attached the actual applications themselves to the Complaint. Id. The City
 13 does not allege that it has registered or attempted to register copyrights in its video
 14 recordings of the City Council meetings of July 20, 2010, April 11, 2013, or
 15 February 11, 2014. Id.³

16 The City seeks assorted relief including an award of attorneys' fees under 17
 17 U.S.C. § 505. See Cmplt. ¶ 21 ("Plaintiff further is entitled to [its] attorneys' fees
 18 and costs pursuant to 17 U.S.C. § 505."); Prayer at p. 7 ¶ C (requesting "[a]n award
 19 of costs and attorney's fees under 17 U.S.C. § 505 or any other applicable basis").
 20 The Complaint does not mention Section 412 of the Copyright Act, or otherwise
 21 allege that the City has complied with the requirements for seeking attorneys' fees
 22 and costs under Section 412 or Section 505.

23 //

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25 //

26 ³ The City alleges that it has submitted applications to register its video
 27 recordings of City Council meetings held on 8/30/2011, 9/13/2011, 4/17/2012,
 28 6/18/2013, and 8/27/2013, but it does not allege that these videos were used in any
 particular allegedly infringing work. Cmplt. ¶¶ 14, 19, Cmplt. Ex. A.

III.

**THE CITY'S REQUEST FOR ATTORNEYS' FEES SHOULD BE STRICKEN
BECAUSE FEES ARE NOT RECOVERABLE AS A MATTER OF LAW.**

Federal Rule of Civil Procedure 12(f) provides that a “court may strike from a pleading … any redundant, immaterial, impertinent, or scandalous matter.” Courts have defined “immaterial” matter to include allegations that “ha[ve] no essential or important relationship to the claim for relief or defenses pleaded.” Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev’d on other grounds, 510 U.S. 517, 535 (1994). Courts have defined “impertinent” matter to include allegations “that do not pertain, and are not necessary, to the issues in question.” Id. at 1527.

The Ninth Circuit has emphasized that the use of motions to strike under Rule 12(f) serves an important purpose – specifically, “to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” Fantasy, 984 F.2d at 1527. A district court may “properly grant [a] motion to strike for the purpose of streamlining the ultimate resolution of the action and focusing the jury’s attention on the real issues in the case.” Fantasy, 984 F.2d at 1528 (citing California ex rel. State Lands Comm’n v. United States, 512 F. Supp. 36, 38 (N.D. Cal. 1981)).

Improper prayers for attorneys' fees are an appropriate subject for a motion to strike under Rule 12(f). As one court explained, because "fees requests do not comprise any one cause of action, a motion to strike is the appropriate vehicle to address them." N. Cal. River Watch v. Fluor Corp., 2014 U.S. Dist. LEXIS 141198, at *2 n.1, 10-11 (N.D. Cal. Oct. 2, 2014) (striking request for attorneys' fees). See also Cal. Dep't of Toxic Substances Control v. Alco Pacific, Inc., 217 F. Supp. 2d 1028, 1045-46 (C.D. Cal. 2002) (striking prayer for attorneys' fees under Rule 12(f)); Konkol v. Oakwood Worldwide Local, LLC, 2015 U.S. Dist. LEXIS 67, at *8-9 (C.D. Cal. Jan. 2, 2015) (same); Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc., 2014 U.S. Dist. LEXIS 130583, at *18-19 (E.D. Cal. Sept. 16, 2014)

1 (same); Moya v. CitiMortgage, Inc., 2014 U.S. Dist. LEXIS 50548, at *17-18 (S.D.
 2 Cal. Mar. 28, 2014) (same).

3 Applying these principles, courts regularly have struck prayers for attorneys'
 4 fees in copyright-infringement actions where, as here, those remedies were barred by
 5 Section 412. See, e.g., Cognotec Servs. Ltd. v. Morgan Guaranty Trust, 862 F. Supp.
 6 45, 52 (S.D.N.Y. 1994) (granting Rule 12(f) motion to strike plaintiff's requests for
 7 attorneys' fees and statutory damages for failure to meet timely registration
 8 requirements under Section 412); see also Dos Santos v. Telemundo Commc'ns Grp.,
 9 LLC, 2012 WL 9503003, at *7 (C.D. Cal. Dec. 19, 2012) (striking request for
 10 attorneys' fees for failure to satisfy Section 412 requirements); Equine Legal
 11 Solutions v. Buntrock, 2008 WL 111237, *1 n.1 (N.D. Cal. 2008); Pamlioff v. Giant
 12 Records, Inc., 1991 WL 334916, at *9 (N.D. Cal. Oct. 28, 1991).

13 **A. Section 412 Forecloses The City's Request For Attorney's Fees.**

14 The City's request for attorneys' fees should be stricken for failure to allege
 15 that it registered or applied to register copyrights in the underlying works before
 16 commencement of the alleged infringement or within three months after the
 17 underlying works' first publication, as required under Section 412. The plain
 18 language of the statute bars recovery of attorneys' fees and statutory damages "as
 19 provided by sections 504 and 505," when the purported "infringement of copyright
 20 commenced after first publication of the work and before the effective date of its
 21 registration, unless such registration is made within three months after the first
 22 publication of the work." 17 U.S.C. § 412. Simply put, to recover statutory damages
 23 or recover attorneys' fees under the Copyright Act, "the copyrighted work must have
 24 been registered prior to commencement of the infringement, unless the registration is
 25 made within three months after first publication of the work." Derek Andrew, Inc.,
 26 v. Poof Apparel Corp., 528 F.3d 696, 699 (9th Cir. 2008) (emphasis added).⁴

27
 28 ⁴ The City has not requested statutory damages. See Cmplt. p. 6-7.

1 The rationale for Section 412's limitation on the availability of statutory
 2 damages and attorneys' fees is twofold. First, "Congress sought to provide copyright
 3 owners with an incentive to register their copyrights promptly." Derek Andrew, 528
 4 F.3d at 700. Second, Section 412 "encourages potential infringers to check the
 5 Copyright Office's database." Id.⁵

6 Applying Section 412, courts repeatedly have held that plaintiffs may not
 7 recover statutory damages or attorneys' fees where the allegedly infringing activity
 8 commenced prior to registration, even if the infringing activity continued thereafter.
 9 For example, in Derek Andrew, the Ninth Circuit held that the plaintiff was not
 10 entitled to recover statutory damages or attorneys' fees under the Copyright Act
 11 where the defendant's acts of infringement started before the plaintiff registered its
 12 copyright in its design. Derek Andrew, 528 F.3d at 700-01 (noting that "[e]very
 13 court to consider the issue has held that 'infringement commences for the purposes of
 14 § 412 when the first act in a series of acts constituting continuing infringement
 15 occurs'"') (citation omitted).

16 Similarly, in Ondo v. Ries, the Ninth Circuit held that the plaintiff could not
 17 recover attorneys' fees because he failed to show that the infringed articles "ha[d]
 18 ever been registered, much less within three months of their publication." 743 F.2d
 19 630, 634 (9th Cir. 1984). As the court explained, "Section 412 therefore precludes
 20 [plaintiff] from collecting statutory damages, or attorneys' fees under § 505." Id.;
 21 see also Mackie v. Rieser, 296 F.3d 909, 911 (9th Cir. 2002) (plaintiff "did not have
 22 a registered copyright on the work at the time of infringement and consequently
 23 could not take advantage of statutory damages for infringement").

24

25 ⁵ As one court explained, because Section 412 "is intended to induce[] in
 26 some practical way copyright registration," copyright holders "should not be given
 27 special statutory remedies unless the owner has, by registration, made a public
 28 record of his copyright claim." Livingston v. Morgan, 2007 WL 2140900, at *5
 (N.D. Cal. July 25, 2007) (citing the Historical and Statutory Notes to 17 U.S.C. §
 412) (internal quotations omitted).

1 The City has identified six allegedly infringing videos that use clips from five
 2 City Council meetings held on July 20, 2010, May 22, 2012, April 11, 2013, April
 3 23, 2013, and February 11, 2014. Cmplt. ¶ 19. Of these five City Council meetings,
 4 the City has only alleged that it has applied to register copyrights for the videos of
 5 the May 22, 2012, and April 23, 2013 meetings. Compare Cmplt. ¶ 19 with Cmplt.
 6 Ex. A. Therefore, the City has not alleged that it has registered or applied to register
 7 copyrights for the City Council meetings held on July 20, 2012, April 11, 2013, and
 8 February 11, 2014, which are allegedly the underlying works for Video One, Video
 9 Two, Video Four, or Video Six. Because the City has failed to allege that it has
 10 registered or applied to register copyrights for the underlying works, the City may
 11 not recover attorneys' fees under § 505 for Video One, Video Two, Video Four, or
 12 Video Six. See Oddo, 743 F.2d at 634 (attorneys' fees and statutory damages were
 13 barred because the plaintiff had not shown that the works were ever registered).

14 Although the City allegedly has applied to register copyrights for the video
 15 recordings of the May 22, 2012, and April 23, 2013 City Council meetings, the City
 16 has failed to allege that it filed its copyright application before the allegedly
 17 infringing activity commenced or within three months of the underlying works' first
 18 publication. As a result, attorneys' fees related to Videos Three and Five are also
 19 barred by Section 412. See Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc., 832
 20 F. Supp. 1378, 1393 (C.D. Cal. 1993) (request for attorneys' fees and statutory
 21 damages was barred by Section 412 because the design was registered after the
 22 infringing activity began and more than three months after first publication).

23 Moreover, this defect cannot be cured by amendment. The YouTube pages
 24 displaying Video Three and Video Five, which are cited and linked at Paragraph 19
 25 of the Complaint and incorporated therein by reference, show that these videos were
 26 posted on December 21, 2013, and September 28, 2014, respectively. See Teixeira
 27 Decl. ¶¶ 4(c), 4(e); Exs. B-3, B-5. The underlying "works" are video recordings of
 28 City Council meetings held on May 22, 2012, and April 23, 2013. Cmplt. ¶ 19. The

1 City acknowledges that it has only now sought to apply to register copyrights in the
2 video recordings of these two City Council meetings (clearly for purposes of this
3 lawsuit), as it alleges that the applications still remain pending. Id. ¶ 14, Cmplt. Ex.
4 A. Therefore, there is no possibility that these works were registered before the
5 commencement of the alleged infringement, or within three months of first
6 publication, as required under Section 412.

7 Absent a copyright registration or a pending application that was filed before
8 the allegedly infringing activity began or within three months of the underlying
9 works' first publication, the City cannot recover attorneys' fees under Section 505 in
10 this action.

11 **IV.**

12 **CONCLUSION**

13 For the foregoing reasons, Mr. Teixeira respectfully requests that the Court
14 strike the City's request for attorneys' fees in its copyright infringement claim
15 (Cmplt. ¶ 21) and its prayer for relief (Cmplt. at p. 7, Prayer ¶ C).

16
17 DATED: April 16, 2015

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
DAN LAIDMAN
DIANA PALACIOS

20 By: /s/ Dan Laidman
21 Dan Laidman

22
23 Attorneys for Defendant
24 Joseph Teixeira

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